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April 3, 2000

**Via Hand-Delivery**

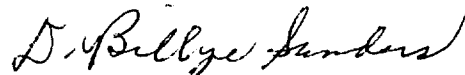
K. David Waddell  
Executive Secretary  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, Tennessee 37219

Re: Application of Memphis Networx, LLC for a Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunication Services and Joint Petition of Memphis Light Gas & Water Division, a Division of the City of Memphis, Tennessee ("MLGW") and A&L Networks-Tennessee, LLC ("A&L") for Approval of Agreement Between MLGW and A&L regarding Joint Ownership of Memphis Networx, LLC; Docket No.99-00909 - Motion in Limine, Memorandum in Support of Motion in Limine and Objections to Introduction of Various Statements and Documents into Evidence

Dear Mr. Waddell:

Enclosed you will find the original and thirteen (13) of the Motion in Limine, Memorandum in Support of Motion in Limine and various objections to documents and statements proposed to be introduced into evidence in the above referenced proceeding, which are filed on behalf of Memphis Networx, LLC, Memphis Light Gas & Water Division and A&L Networks-Tennessee, LLC

Sincerely,



D. Billye Sanders  
Attorney for Memphis Light Gas & Water  
Division and  
Memphis Networx, LLC

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K. David Waddell  
April 3, 2000  
Page 2

*J. Knox Walkup Esq.*

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Wyatt, Tarrant & Combs  
Attorney for A&L Networks-Tennessee,  
LLC and Memphis Networkx, LLC

DBS:lmb  
Enclosures

cc: Parties of Record  
J. Maxwell Williams, Esq.  
Ward Huddleston, Esq.

## OBJECTIONS TO EXHIBITS TO WILLIAM J. BARTA

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EXECUTIVE SECRETAR

The Applicant and Joint Petitioners hereby object to Exhibits 3, 4, 5 and 6. Applicant and Joint Petitioners specifically object to various excerpts from documents contained in the exhibits for the reasons set forth below:

### Exhibit WJB-2

Applicant and Joint Petitioners object to the:

1. excerpt from the April 22, 1999 draft of Memorandum of Understanding on the grounds it is irrelevant to the issues in this proceeding. The excerpt is from a draft document that was never circulated to City of Memphis. It has no legal effect and was never executed by either of the proposed parties.
2. excerpt from September 29, 1999 Memo from Michael Kissell to Wade Stinson on the grounds it is irrelevant to the issues in this proceeding. No fibers have been deployed pursuant to the Entergy contract, as the contract with Entergy has not even been finalized. (See Wade Stinson's rebuttal testimony at page 3).
3. excerpt from November 25, 1999 interdepartmental communication from Michael Kissell on the grounds it is irrelevant to this proceeding. On the face of this document it is obvious it is a report on what a speaker said at a telecommunication's workshop which was not specifically targeted to the Telecommunication's Joint Venture at issue in this docket. (See Wade Stinson's rebuttal testimony at page 3).
4. excerpt from A&L Networks, LLC, December 1, 1998 response to MLGW Request for Proposal for Strategic Telecommunications Partnership on the grounds it is irrelevant to the issues before the TRA in this proceeding. The ultimate decision to enter into a joint venture is evidenced by the Operating Agreement before the Authority, the Operating Agreement superceded earlier concepts proposed which involved joint use of MLGW's infrastructure. The Operating Agreement before the TRA involves separate entities with separate facilities. Therefore, any facilities of MLGW used by Memphis Networkx will be used on a contract basis. (See Wade Stinson's rebuttal testimony at page 4).
5. excerpt from MFS Network Technology's Response to MLGW's Request for Proposal for Telecommunications Strategic Partner on the grounds this is irrelevant to the issues before the TRA in that it represents

an excerpt from a response to a proposal that has not been accepted by MLGW.

6. excerpt from BellSouth Business' response to MLGW's Request for Proposal for Telecommunications Strategic Partner on the grounds it is irrelevant to the issues in this proceeding and represents the response to a proposal not accepted by MLGW.

7. excerpt from March 24, 1999 Memo from Erik Wetmore to MLGW.CORP on the grounds it is irrelevant to the issue of use of MLGW's existing infrastructure for the Telecommunication's joint venture in that no contract with Entergy has been executed and no fiber has been deployed. (See Wade Stinson's rebuttal testimony at page 4).

8. excerpt from March 2, 1999 Letter from Joel D. Halvorson of Arthur D. Little to Wade Stinson and Alex Lowe on the grounds this document is irrelevant to the issue of use of MLGW's existing infrastructure in that it contains information discussed during the planning stages, and has been taken out of context. (See Wade Stinson's rebuttal testimony at pages 4-5).

9. excerpt from January 6, 1999 Proposal of A&L Network, LLC, Arthur D. Little, Inc. and Nortel Networks to MLGW for Strategic Telecommunication's Partnership on the grounds it is irrelevant to the current agreement as to the use of MLGW's existing infrastructure. (See Wade Stinson's rebuttal testimony at page 4).

### **Exhibit WJB-3**

Applicant and Joint Petitioners object to the introduction of the following statements contained in WJB-3:

1. excerpt from A&L Network's December 1, 1998 Response to MLGW's Request for Proposal for Strategic Telecommunications Partnership on the grounds it is irrelevant to the issue of access to MLGW personnel and customer information. (See Wade Stinson's rebuttal testimony at page 5).

2. excerpt from March 2, 1999 Letter from Joel Halvorson of Arthur D. Little, Wade Stinson and Alex Lowe on the grounds it is irrelevant to the actual time spent by MLGW's employees on telecom venture matters and has no binding effect upon MLGW and/or A&L. (See Wade Stinson's rebuttal testimony at page 5-6).

3. excerpt from January 6, 1999 Proposal of A&L Network's LLC, Arthur D. Little, Inc. and Nortel Network to MLGW for Strategic Telecommunications Partnership on the grounds it is irrelevant to the issue

of access to MLGW's customer information by Memphis Networkx, has no binding effect upon MLGW, A&L or Memphis Networkx. (See Wade Stinson's rebuttal testimony at page 6).

4. excerpt from March 10, 1999 Memo from Joel Halvorson to Wade Stinson on the grounds the suggestion in the memo is irrelevant to the actual time spent by MLGW personnel on evaluating the telecom joint venture. As indicated in the memo, this is a suggestion, not a statement of what actually occurred. (See Wade Stinson's rebuttal testimony at page 6).

5. excerpt from April 8, 1999 Memo from Joel Halvorson to Wade Stinson on the grounds it is irrelevant to actual time spent by MLGW personnel on evaluating the telecom joint venture and that it is taken out of context. (See Wade Stinson's rebuttal testimony at page 6).

#### **Exhibit WJB-4**

The Applicant and Joint Petitioners object to the excerpts from documents set forth on WJB-4 for the following reasons:

1. excerpt from April 9, 1999 Letter from Alex Lowe to W. L. Thompson on the grounds that it is irrelevant in that it is an excerpt from a letter agreement which is dated April 5, 1999 and which has been superseded by the Umbrella Agreement and Operating Agreement filed in this docket and dated November 8, 1999.

2. excerpt from A&L Networks, LLC December 1, 1998 Response to MLGW Request for Proposal for Strategic Telecommunications Partnership on the grounds that it has no probative value. The unfounded implication is that Memphis Networkx is not entitled to the benefits, if any, that come with disclosing that one of its owners is MLGW.

3. excerpt from January 6, 1999 Proposal of A&L Networks, LLC, Arthur D. Little, Inc. and Nortel Networks to MLGW for Strategic Telecommunications Partnership on the same grounds as number 2 above.

4. excerpt from November 25, 1999 Interdepartmental Communication from Michael Kissell on the grounds it is irrelevant due to the fact it is a trip report of no probative value in this proceeding.

#### **Exhibit WJB-5**

Applicant and Joint Petitioners object to the excerpts from documents in WJB-5 for the following reasons:

1. excerpt from June 1, 1999 Letter from Alex Lowe to Wade Stinson and Larry Thompson on the grounds it is irrelevant in that it does not indicate the nature or ownership of the conduit and the implication for which the letter is offered has no probative value to issues in the proceeding. (See Wade Stinson's rebuttal testimony at page 7-8).

2. excerpt from April 1, 1999 Letter from Alex Lowe to J. B. Hollingsworth, general manager of BellSouth, Inc. on the grounds it is irrelevant to the issues in this proceeding and does not involve the Memphis Networx project.

3. excerpt from May 24, 1999 Meeting Notes on the grounds they are irrelevant to the Memphis Networx proposal.

4. excerpt from September 29, 1999 Memo from Michael Kissell to Wade Stinson on the grounds it is irrelevant to the issues in this proceeding. No fibers have been deployed pursuant to the Entergy contract, as the contract with Entergy has not even been finalized. (See Wade Stinson's rebuttal testimony at page 3).

5. October 1999 Draft Agreement between MLGW and A&L Networks Tennessee, LLC to establish a joint venture to provide telecom service on the grounds this is irrelevant because it is an unexecuted draft of the Umbrella Agreement. The executed Umbrella Agreement which has been filed in this docket supersedes the draft and the draft has no legal effect.

#### **Exhibit WJB-6**

Memo from Allan Long to Michael Kissell and Wade Stinson dated September 15, 1999 on the grounds it is irrelevant to the issues before the TRA and constitutes an inquiry by an MLGW employee which has no legal effect on the telecommunications proposal before the TRA.

#### **Other Objectionable Matters in Mr. Barta's testimony**

Applicant and Joint Petitioners object to:

1. the characterization by Mr. Barta on page 11, lines 24-27 and page 12, lines 15-17 which implies that the telecommunications venture, i.e., Memphis Networx, is not regulated, on the grounds it is an erroneous assumption and/or mistake in law.

2. excerpt from July 22, 1999 Memo from Erik Wetmore to MLGW.CORP referenced on page 13, lines 9-15 of Mr. Barta's testimony on the grounds the information involves preliminary discussions and is irrelevant to the issues before the TRA in this proceeding.

3. excerpt from E-mail dated August 23, 1999 between Wade Stinson and Alex Lowe referenced on page 13 and 14 of Mr. Barta's testimony on the grounds the information is irrelevant to issues in this proceeding and is merely offered as a red herring to distract the TRA from the substantive issues in the proceeding. (See Wade Stinson's testimony page 9).

4. References to meeting notes on page 14, lines 10-18, on the grounds they are irrelevant and do not constitute official business records of MLGW and have no legal effect.

**Objections to document production request dated March 31, 2000 related to deponent, Larry Thompson:**

1. Applicant and Joint Petitioners object to the production of the documents in paragraph 1 on the grounds it is over burdensome, that some of the documents requested have already been produced and that the request violates the discovery schedule established in this proceeding. MLGW has already produced documents evidencing communications between MLGW and A&L Underground relating to certain conduit. Documents relating to construction of utility facilities between A&L Underground, Inc. and MLGW between January 1, 1998 and January 1, 2000 are irrelevant to this proceeding and would be far too voluminous to produce in a deposition or at hearing. Subject to and without waiver of the foregoing objections, A&L Underground has approximately 29 crews that work on construction projects for MLGW and each crew submits a three to four inch report every week. Such information covering a period of two years would generate a voluminous volume of documents

2. Applicant and Joint Petitioners object to furnishing of the requested documents as violating the discovery schedule in this docket.

3. Applicant and Joint Petitioners object to the furnishing of any documents or papers or communications relating to preparation of any filing, petition or request for any franchise or authority that provide telecommunications services on the grounds that any such document not already provided to the authority is irrelevant or constitutes attorney work product. Testimony has been filed that indicates that Applicant has applied for a franchise from the City of Memphis. Upon approval by the City of Memphis, Applicant will file the franchise agreement with the TRA for approval pursuant to applicable law. Further, the request for documents violates the discovery schedule established in the proceeding. MLGW has already furnished to intervenors the documents with respect to procurement of an interdivisional loan from the MLGW Electric Division to the MLGW Telecommunications Division, the proceeds of which will be used by the MLGW Telecommunications Division to invest in Memphis Network.

Objection to documents on list of March 31, 2000 by interveners regarding additional exhibits to be used in conjunction with William Barta's testimony at the hearing.

Applicant and Joint Petitioners object to the introduction of the documents on this list on the grounds that no reason has been given for the introduction of such documents. To the extent the proposed exhibits constitute documents from which excerpts were taken in Mr. Barta's testimony, Applicant and Joint Petitioners renew the objections above to those documents.



**BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

**IN RE:**

**APPLICATION OF MEMPHIS NETWORKX, LLC  
FOR A CERTIFICATE OF PUBLIC CONVENIENCE  
AND NECESSITY TO PROVIDE INTRASTATE  
TELECOMMUNICATION SERVICES AND JOINT  
PETITION OF MEMPHIS LIGHT GAS & WATER  
DIVISION, A DIVISION OF THE CITY OF  
MEMPHIS, TENNESSEE ("MLGW") AND A&L  
NETWORKS-TENNESSEE, LLC ("A&L") FOR  
APPROVAL OF AGREEMENT BETWEEN MLGW  
AND A&L REGARDING JOINT OWNERSHIP OF  
MEMPHIS NETWORKX, LLC.**

**DOCKET NO. 99-00909**

**MOTION IN LIMINE**

Memphis Networkx, LLC, Memphis Light, Gas and Water Division and A & L Networkx-Tennessee, LLC respectfully submit this Motion in Limine requesting an order excluding any testimony or evidence or any further discovery regarding certain matters specified below at the depositions of Larry Thompson and Alex Lowe and at the hearing of the above entitled action which is in any way relate to the following matters.

1. Any and all testimony or documents relating to negotiations between Memphis Light, Gas and Water and A & L Networkx-Tennessee or any individuals acting on their behalf with regard to the Operating Agreement executed and dated November 8, 1999, when such discussions, reports, correspondence or other documents were created or took place prior to the execution of the contract. The language of the Operating Agreement in Section 14.9 is as follows

"Entire Agreement. This Operating Agreement constitutes the entire agreement and understanding of the parties hereto with respect to the subject matter hereof and all prior and concurrent agreements, understandings, representations and warranties with respect to such

subject matter whether written or oral are and have been merged herein and superceded hereby."

A similar provision is contained in the "umbrella" agreement at paragraph 11(d). (Supplement to the Application Exhibit M).

2. All reports, correspondence or other documents or memoranda of conversations to or from or relating to any entities other than the applicant and the two joint petitioners.

3. Any documents presented for the purpose of showing intent of a party or individual.

4. Any documents presented for the purpose of showing disclosure or non-disclosure of records outside this proceeding.

5. As to deponents Larry Thompson and Alex Lowe, any matter not included in the March 27, 2000 statement of inconsistencies submitted by interveners' counsel. Additionally the depositions should be limited to two hours.

6. All documents, correspondence or other matters relating to any construction, whatever the time of construction, by A & L Underground, Inc.


7. All documents requested on March 31 to be produced by and to accompany Mr. Lowe and Mr. Thompson at their depositions.

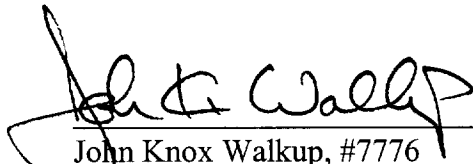
8. All documents attached and referenced in the March 27, 2000 filings in support of requests for depositions made by Counsel for Time-Warner and Tennessee Cable Television Association and Counsel for NEXTLINK.

Injustice, delay and confusion will result if the above matters are introduced or presented at the hearing or deposition.

In support of this motion, applicant and joint petitioners submit the accompanying memorandum.

Respectfully Submitted,

  
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Attorney for A&L Networks - Tennessee  
and Memphis Networx, LLC

BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE

IN RE:

00 APR 3 PM 2 05

APPLICATION OF MEMPHIS NETWORKX, LLC  
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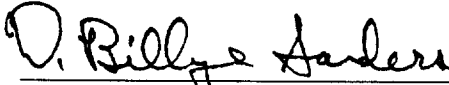
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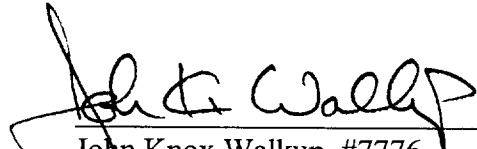
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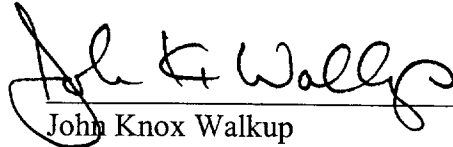
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Attorney for A&L Networks - Tennessee  
and Memphis Networkx, LLC

Certificate for Service

The undersigned hereby certifies that a copy of the motion was forwarded to all parties of this record by U.S. Mail, postage, prepaid, on this \_\_\_\_\_ day of \_\_\_\_\_, 2000.

  
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**BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

IN RE:

00 APR 3 PM 2 04

**APPLICATION OF MEMPHIS NETWORK, LLC  
FOR A CERTIFICATE OF PUBLIC CONVENIENCE  
AND NECESSITY TO PROVIDE INTRASTATE  
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APPROVAL OF AGREEMENT BETWEEN MLGW  
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MEMPHIS NETWORK, LLC.**

**DOCKET NO. 99-00909**

**MEMORANDUM IN SUPPORT  
OF  
MOTION IN LIMINE**

In 1995 and then again in 1999, the Tennessee General Assembly enacted statutes expressing the state's policy in support of competition in the telecommunications industry which were designed in both instances to assist the consumer. In 1995, the General Assembly opened the doors to competition by providing that any applicant must demonstrate simply that it will adhere to all regulatory, policies, rules and orders and possess sufficient managerial, financial and technical abilities to provide the services. Upon those showings, a Tennessee Regulatory Authority order "shall be entered no more than sixty (60) days from the filing of application."

In 1999, the Tennessee General Assembly provided that each municipality operating an electric plant is authorized to establish a joint venture or any other business relationship with one or more parties to provide telecommunication services. Such an agreement is required to be approved by the Tennessee Regulatory Authority and the joint venture and its members "shall be



subject to regulation by the Tennessee Regulatory Authority in the same manner and to the same extent as other certified providers of telecommunication services," including specified duties. Without question, the Tennessee Legislature recognized municipal power companies must adhere to rules designed to protect against anti-competitive practices, but the General Assembly also made it unmistakably clear that the role of the Tennessee Regulatory Authority was to facilitate their entry into the telecommunication business. Specifically, the entry requirements for the joint venture applicant were unchanged and the only new requirement was that the joint venture agreement be approved by the Tennessee Regulatory Authority.

If the General Assembly's goal is to be realized, municipal electric power plants must be allowed to enter the competitive field without burdensome, unreasonable, and almost paralyzing procedural obstacles. While this proceeding involves only one such public utility, a large utility which is committed to entry into the telecommunications business, whatever is done in this case will determine whether future municipal utilities even bother to apply. If massive public records requests can be turned into enormous data/discovery requests, followed by request for depositions outside TRA procedural schedules, followed by supplementary document requests to accompany those depositions, then intervening competitive local exchange companies may have effectively discouraged and snuffed out this potential opportunity for increased competition for consumers.

Despite explicit legislative intent, municipal companies may stay out for procedural reasons which are financially burdensome. While some latitude for discovery and some potential delay may be reasonable as part of any regulatory application scheme, this case has become a classic example of the ability of interveners, with whom the entrant will compete, to burden the utility and its partner, as well as their counsel, with procedural requests that drive up the cost and delay the entry into the

marketplace of a legislatively-authorized competitor. If such efforts by interveners are not accompanied by aggressive control over the burdensome, oppressive, and delaying tactics - a control that can only be provided by the regulator and its staff - then the cost of entry in terms of resources, time and defensive public relations efforts, may be effectively prohibitive. Not only is the legislature's sixty day order provision a dead letter for this type of applicant, but the legislature's 1999 statute will be dead on arrival for all but the most tenacious companies. Consumers will be the real victims.

In this case alone, the interveners have called upon the Applicant and Joint Petitioner for massive amounts of document production. Memphis Light Gas and Water produced over 5,000 pages in response to a request by counsel for one of the interveners in December 1999. That same counsel sent a new request on Thursday evening, March 30, 2000, with the demand for a response by April 4, 2000. One intervener submitted 58 data requests and another submitted 18 requests. With all those documents in hand, those two interveners requested discovery depositions or appearances at trial by nine (9) additional individuals. While the number of deponents has been reduced to two, it is absolutely necessary to limit the scope of the depositions and hearing and close out future requests of any other type.

Likewise, operating under the assumption that competition was being encouraged and the regulator's duty was not to deny entry, but to facilitate it, using conditions and requirements to assure that the competition is fair, the Applicant and Joint Petitioners have sought at pre-hearing conferences with all parties present, to arrange meetings with staff where all parties would be present, in order to assure accounting compliance by MLGW procedures as early as possible, rather than being told at the hearing to go back and try again. Applicant and Joint Petitioners did not then

and do not now want ex parte sessions with staff. What they want is to determine as most applicants are allowed to find out from staff, how they can comply, recognizing that they are the first municipal power company to utilize this new legislative authorization. Again, if other potential applicants in the future can not sit down, with any other parties present, and develop an understanding of staff requirements, then they may simply leave the legislature's invitation to help consumers unanswered.

It is settled Tennessee law that the meanings and terms of an agreement are set out in the language of that agreement itself, especially where a provision of that agreement says that it is the sole document governing its terms. Nevertheless, much of the discovery and document production, as well as the attack upon the Applicant and Joint Petitioners contained in the pre-filed testimony of the witness for Tennessee Cable Television Association has involved pre-agreement discussion points, negotiations and records. While those documents are public records and Memphis Light, Gas and Water has willingly complied with the public records request, no other, and non-public entity, applicant before the Tennessee Regulatory Authority would have to submit such records and the absence of such records would not adversely affect that applicant. Just because the records have been made available does not mean that they are relevant, admissible or probative. Those questions must be addressed by regulators and their staff, not by the decibel level of the intervenors.

In addition, much of the attention in the discovery requests, and in the testimony of Mr. Barta, is focused on examination of entities that are simply not the Applicant or a Joint Petitioner. The Applicant/Joint Petitioners are before this body and are accountable for their actions should the application and agreement be approved. It is unreasonable, burdensome and unfair to pursue every entity that has any relationship to them or has done business with them.

Finally, these Applicants and Joint Petitioners have been the target of an almost unprecedented attack on their integrity without any foundation whatsoever. The Intervenor's witness has testified that "the principal players associated with the organization and operations of Memphis Networkx appear to have made an attempt to circumvent the regulatory process." To use outdated and inoperative memoranda, proposals and brainstorming notes to attack the integrity of individuals associated with this application is simply unconscionable. Equally disturbing is that his bald assertions have given rise to additional discovery demands in the form of depositions and document production requests, all of which are not germane to this proceeding.

In 1995, the Legislature opened the door to new competitors and in 1999 specifically said joint ventures by a municipal electric company could be among those competitors. If this proceeding is to meet the requirements of the law as enacted by the Tennessee General Assembly, and if the aspirations of other municipal power plants are to be realized, it is necessary that control be exercised by the Tennessee Regulatory Authority over the discovery and evidence that these interveners seek to pursue and present. Otherwise, it will be too late.

To that end, the Applicant and Joint Petitioners ask that every item of evidence be examined in light of the two statutory requirements: (1) that the applicant meet the statutory (financial, managerial and technical) requirements of Tennessee Code Annotated §65-4-201, and (2) that the agreement meet the requirements of Tennessee Code Annotated 7-52-103 (d). The Tennessee Regulatory Authority has approved nine issues. Two of those issues are purely legal issues separately briefed by the parties. The remaining issues excluding the two statutory requirements noted above are focused on whether specific conditions are necessary to assure compliance by this Applicant and these Joint Petitioners with legal requirements. Development of these issues does

not require broad evidentiary invitations, but rather a focus of the evidence on the issues at hand. From this, stipulations should be negotiated, limiting issues at the hearing.

The Pre-Hearing Officer and the Tennessee Regulatory Authority should exclude all evidentiary items except those relating to (1) whether the Applicant meets the statutory requirement (2) whether the terms of the agreement actually executed by the party should be approved with or without conditions. Among those items to be excluded would be: (1) notes, memoranda, correspondence or other documents relating to negotiations, plans or deliberations about the agreement prior to the execution of the agreement; (2) reports, correspondence, documents, or other matters from, about, or to all entities other than the Applicant and two Joint Petitioners; (3) any questioning of the witnesses or presentation of documents not related to the action taken, specifically excluding questions or documents about the intent of the parties or individuals; and (4) questioning of witnesses or production of documents relating to disclosure or non-disclosure of records as that issue is clearly out of the purview of this body.

The agreement approval portion of this proceeding is under Tennessee Code Annotated §7-52-103(d) which requires that the joint venture or business relationship agreement be approved by the Tennessee Regulatory Authority. It is therefore ironic that the only witness for the intervenors did not mention the agreement in his testimony, but devoted his testimony to pre-agreement negotiations memoranda, reports, correspondence and other documents pre-dating the agreement itself. Likewise, all documents attached to the depositions request justifications (March 27, 2000) by the intervenors and relating to the parties' agreement are pre-agreement documents, which the final agreement, by its terms, excludes as irrelevant.

The Pre-Hearing Officer and the Tennessee Regulatory Authority should exclude any testimony or other evidence regarding any negotiations or discussions that occurred prior to the execution of the Agreement. The Agreement at issue in this matter contains an acknowledgment by both parties that its provisions constitute the parties' complete agreement, and the language in the contract is clear and unambiguous. Under Tennessee law, the introduction by a party to the agreement of evidence of any prior or contemporaneous negotiations or discussion for the purpose of altering, contradicting, or varying the terms of a clear and unambiguous written agreement is prohibited. While the rule itself applies to parties to an agreement, the same evidentiary principle should be applied to this proceeding and these interveners.

Under Tennessee law, when parties have entered into an agreement which includes that such is the complete agreement between the parties, evidence is not admissible to vary the terms of such a contract. *Newark Insurance Company v. Seyfert*, 392 S.W.2d 336, (Tenn. Ct. App. 1964), *cert. denied* March 4, 1965 ("It is well settled law that when parties have made a contract and have expressed it in a [clear and unambiguous] writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parole or otherwise, of antecedent understandings, etc., will not be admitted for the purpose of varying or contracting the writing."). *See also Book-Mart of Florida, Inc. v. National Book Warehouse, Inc.*, 917 S.W.2d 691, (Tenn. Ct. App. 1995), *p.ta. denied* March 11, 1996 ("[T]he parole evidence rule excludes testimony of prior conversations for the purpose of altering, contradicting, or varying the terms of a clear and unambiguous written agreement."); *Faithful v. Gardner*, 799 S.W.2d 232, (Tenn. Ct. App. 1990), *p.t.a. denied* October 1, 1990 ("Testimony of prior or contemporaneous conversations for the purpose of altering, contradicting, or varying the terms of the written instrument [that is clear and

unambiguous] are incompetent and inadmissible."); *Brown v. Brown*, 320 S.W.2d 721, 728 (Tenn. Ct. App. 1958), *p.t.a. denied* January 23, 1959 ("[P]arole evidence cannot be admitted to contradict or vary the terms or to enlarge or diminish the obligation of a[n unambiguous] instrument or deed, except on grounds of fraud, accident or mistake.");

In this case, the written agreement clearly states that it is the entire agreement between the parties. **It states as follows:**

Section 14.9 Entire Agreement. This Operating Agreement constitutes the entire agreement and understanding of the parties hereto with respect to the subject matter hereof and all prior and concurrent agreements, understandings, representations and warranties with respect to such subject matter whether written or oral are and have been merged herein and superceded hereby.

The scope of the depositions of Larry Thompson and Alex Lowe should be extremely limited. The deposition of Mr. Thompson and Mr. Lowe should be limited to two(2) hours each. The request made by the interveners was predicated on the alleged inability of any other witness among the four witnesses already identified by the Applicant and Joint Petitioner to fully address a specified "inconsistency" in the testimony filed by the applicant and joint petitioner. Although the Applicant and Joint Petitioners asserted that their existing witnesses could address the alleged inconsistencies, the request for depositions of the additional witnesses was granted. Manifestly, the outer limits of the deposition should not exceed the noted "inconsistencies" on which the requests were based. Counsel for NEXTLINK only identified one issue in his justification for the deposition. That issue had to do with certain work done by A & L Underground, Inc. The scope of counsel's examination of Mr. Lowe and Mr. Thompson should surely not exceed that one issue. For reasons set out elsewhere, this construction work of A&L Underground, Inc. is outside the scope of any issue before the Tennessee Regulatory Authority in this proceeding.

As to counsel for Time-Warner and the Tennessee Cable Telecommunications Association's request of March 27, 2000, the alleged "inconsistencies" were "(1) use of MLGW personnel to an extent much greater than formally disclosed; (2) construction and use of MLGW network infrastructure prior to TRA approval, which has been formally denied; and, (3) use of MLGW name recognition to gain project financing and to market services, which has also been formally denied." Again, for reasons set out elsewhere, issue 2 is not appropriate for consideration in this proceeding. As to issues 1 and 3, examination of Mr. Thompson and Mr. Lowe would be limited to the extent to which the final agreement and the pre-filed testimony of witnesses in this matter provide for the use of MLGW personnel or MLGW name recognition and how Applicant and Joint Petitioner have actually identified and allocated start-up expenses. To that end, all documents set out in the attachment to the March 27 request should be excluded from the deposition and from the hearing inasmuch as they were developed prior to that agreement. Furthermore, those documents are irrelevant and not reasonably calculated to lead to admissible evidence. Specially, most of the documents set out in the section for Alex Lowe were generated by third parties (Arthur D. Little employees for documents number JM 0038, 43, 44, 45 and 47 and MW 00185-186); there is nothing to identify the source of either the 5/21 fax or WS 0283 (the actual document attached is WS 0284) and document number RFP 01319 was written, apparently, by an individual in a department under the supervision of Max Williams, already identified as a witness at the hearing.

Likewise, the documents attached to the request for Larry Thompson are unidentified as to author for document number WS 1551, MW 00175, WS 1548 and LT 0020. All of these predate, some by long periods of time, the execution of an agreement between Memphis Light, Gas and Water and A & L Networks-Tennessee. None bears on an issue within the scope of the issues before



the Tennessee Regulatory Authority, none is relevant or reasonably calculated to lead to admissible evidence, and all are further examples of the broad scope of the net the interveners have cast. For reasons set out above and below the pre-hearing officer and the Tennessee Regulatory Authority should exclude all of those documents and limit Mr. Thompson's testimony.

On March 31, 2000, a request from "interveners" was submitted requesting that Alex Lowe bring certain documents to his deposition now set for April 6, 2000. Those three requests relate to (1) names and positions of all Memphis Networx, LLC or A & L Underground, Inc.'s employees who have worked on the organization and operation of Memphis Networx; (2) all documents evidencing any and all costs or expenses incurred by A & L Networks, LLC and/or A & L Underground, Inc. in connection with organization and/or operation of Memphis Networx, LLC; and, (3) any and all written communication or notes evidencing communications with MLGW, Arthur D. Little, and Nortel Networks pertaining to the organization and/or operation of Memphis Networx, LLC.

Once again after the close of discovery, a new procedural request has been made. It should be denied in full. A & L Underground, Inc. has been, is and will be a separate entity from Memphis Networx and A&L Networks. Such a request relating to an entity which is not a party to this application or joint petition is clearly inappropriate, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Furthermore, it is burdensome and unreasonable for a deponent to be required to bring documents of an entity outside this proceeding. As to items 1 and 2 and A & L Networks, LLC, A & L Networks LLC (now Aptus Networks) is the private parent entity to one of the members of the joint venture. Cross-subsidy concerns by a non-monopoly private parent entity are non-existent. Thus, a requirement for the production of those documents calls for information that is irrelevant and not reasonably calculated to lead to the discovery of

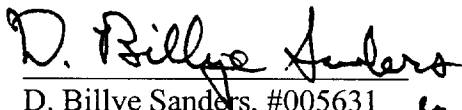
admissible evidence. It is also overly broad and unduly burdensome and should be denied. Finally, Arthur D. Little and Nortel Networks are not before the Tennessee Regulatory Authority in this proceeding and this request calls for information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence, and it is duplicative of material already supplied by MLGW and A&L in records requests. Furthermore, the Nortel Networks communications are subject to a non-disclosure agreement. For that reason alone, the document requests should be denied. Correspondence with MLGW has already been supplied through the public records request made upon MLGW. Furthermore, a request for "notes evidencing communication" is objectionable on the grounds that it is vague, burdensome, and irrelevant.

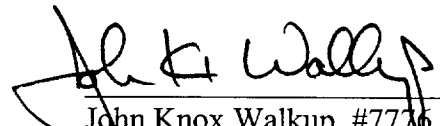
Much has been made in this proceeding concerning the installation of conduit by A & L Underground, Inc. At the same time a large amount of other work was being done by A & L Underground under an agreement with Memphis Light, Gas & Water. The concerns raised wrongly assume that conduit is in fact telecommunications facilities, which it is not. It is an empty plastic tube containing nothing. Even if it were a telecommunications facility and that was a concern under §T.C.A. 65-4-201(a) that prohibits the commencement of construction of a telecommunications facility prior to issuance of a certificate of public convenience, the party involved would be A & L Underground, Inc. However, the only reference to T.C.A. §65-4-201 in the list of issues pending before the Tennessee Regulatory Authority is issue number one which says "Does applicant meet the statutory criteria and requirements set for in T.C.A. §65-4-201 for a certificate to operate as a competitive local exchange carrier in Tennessee?" Memphis Networx is the only applicant in this proceeding. Memphis Networx does not own that conduit, has not constructed that conduit and does not intend to purchase or lease that conduit in the near future and perhaps never. No reasonable

interpretation of the scope of the issues in this proceeding opens the door to that issue. On the contrary, it is clear that only Memphis Networx should be examined under T.C.A. §65-4-201.

For the above reasons, Applicant and Joint Petitioners, urge that testimony and evidence be limited with the appropriate restrictions set out above.

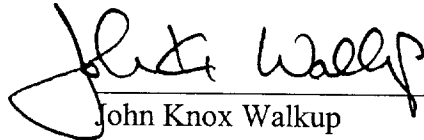
Respectfully Submitted,

  
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Certificate for Service

The undersigned hereby certifies that a copy of the memorandum was forwarded to all parties of the record by U.S. Mail, postage, prepaid, on this 3<sup>rd</sup> day of April, 2000.

  
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